

## CONSULTING SERVICES AGREEMENT

THIS CONSULTING SERVICES AGREEMENT ("Agreement") is made and entered into as of the 23rd day of February, 2011, between Atlas Advertising, Inc., ("Consultant"), whose present address is 2601 Blake Street Suite 301, Denver, CO 80205, and The South Dakota Governors Office of Economic Development, ("Customer"), whose present address is 711 E Wells Ave Pierre, SD 57501

### RECITALS

WHEREAS Customer desires that Consultant render certain professional services to Customer, such work generally described as Website design and development and installation of Atlas InSite, and Consultant is willing to perform such work upon the terms and conditions set forth herein;

NOW, BE IT THEREFORE AGREED, in consideration of the mutual benefits, agreements, covenants and promises herein, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties agree as follows:

#### 1. Scope of Services.

Consultant shall perform those certain services specified on the Statement of Work attached hereto as Attachment A ("Consultant Services"). Consultant shall not be required to perform work not specifically described in the Statement of Work. The parties may mutually agree in writing from time to time on additions or deletions to the Statement of Work, however Consultant shall not be required to perform such additional work until a written agreement is reached as to the time and cost of such additional work and an Amendment To Statement of Work is signed by both Consultant and Customer. In the event of any conflict between the terms of this Agreement and the Statement of Work, the Statement of Work shall control.

#### 2. Performance of Work.

Consultant shall provide Consultant Services in accordance with the Statement of Work. Consultant shall have sole discretion and control over the work of Consultant's employees, agents and contractors in the performance of the work under this Agreement and the manner in which such work is performed. Consultant may use subcontractors or contract labor or services to perform certain portions of the work.

#### 3. Customer Duties and Responsibilities.

3.1 Customer shall make available in a timely manner at no charge to Consultant such data, documentation and materials, together with timely access to appropriate personnel of Customer and such resources of Customer as Consultant may reasonably need for the performance of Consultant Services.

3.2 Customer shall be responsible for, and assumes the risk, of any problems resulting from the content, accuracy, completeness or consistency of the data, materials and information supplied to Consultant.

3.3 Customer shall appoint and designate a client representative who shall provide professional and prompt liaison between Consultant and Client. Primary guidance and direction for Consultant with respect to the services performed hereunder shall come from such client representative.

3.4 If required for the performance of Consultant's work, during such time as Consultant is on Customer's premises, Customer will provide at no charge to Consultant for Consultant's use a workspace and access to the appropriate Customer computing resources

and environment, including phone, fax and other mutually agreed office equipment and material needed for the work Consultant is performing pursuant to this Agreement.

#### 4. Compensation.

4.1 Consultant's compensation for the Consultant Services shall be as set forth in the Compensation Schedule set forth in Attachment B hereto.

4.2 Customer shall be responsible for all reasonable out-of-pocket costs (not including day to day operating expenses such as routine photocopying, long-distance telephone) incurred by Consultant and Customer in connection with performing the Consultant Services, including, but not limited to, out of the area travel, specific reimbursable expenses for photography, stock art and illustration, image searching, hosting, printing and press checks. Customer shall be responsible for payment of all sales, use, excise and other applicable taxes, duties and similar levies on the service provided hereunder or on any equipment, software, license, use, royalty or similar product or service used in connection with performance of the work. All anticipated out of pocket costs are included in the scope of work. Should other out of pocket costs arise, they are limited to \$0.00.

4.3 Unless otherwise specified in this Agreement, all invoices for Consultant Services and out of pockets costs and taxes shall be due and payable within thirty (30) days of receipt. Interest shall accrue on any unpaid amounts at the rate of 1.5% per month from the date such sums were due. Consultant shall have the right to suspend providing of Consultants Services at any time without penalty or liability for breach of this Agreement where Customer fails to pay when due invoices for Consultant Services, costs and taxes.

4.4 Customer may be required to pre-pay for licenses, royalties and fees for art and imagery in order to ensure timely delivery of the same.

4.5 Please make checks payable to: Atlas Advertising llc  
Mail to: 2601 Blake Street, Suite 301 Denver, CO 80205

#### 5. License and Intellectual Property Rights.

5.1 Customer acknowledges that it is not and will not be the author or owner of any code, graphics, data or documentation provided to Customer by Consultant where such code, graphics, data or documentation consists of pre-existing know how, generic, licensed or non-unique software components, structure, architecture, subroutines, functions, algorithms, formulas, third party tools, libraries and programs which Consultant may make use of or incorporate into the work and to which Consultant or and third party licensor has prior copyright ownership ("Pre-existing Materials"). The parties recognize and agree that the code, graphics data or documentation comprising the work performed by Consultant for Customer, other than Pre-existing Materials, is a "work made for hire", and that, provided Customer makes payment in full of all amounts from time to time required to be paid to Consultant hereunder, Customer shall be deemed to be the author of such work. Contingent upon the payment in full to Consultant, Consultant grants Customer a perpetual, personal, royalty free, non transferable right and license to use and modify the work performed by Consultant hereunder, subject at all times however to the rights of others in the Pre-Existing Materials.

5.2 Consultant may retain a copy of any such work for the purpose of displaying specimens or exemplars of their services to third parties, without written approval from Customer. The display of these "work products" shall conform to all levels of confidentiality in this agreement and shall not require Customer's approval in writing prior to disclosure to any third party.

#### 6. Warranties and Remedies.

6.1 EXCEPT AS PROVIDED IN THIS SECTION, ALL SERVICES AND SOFTWARE ARE DELIVERED WITHOUT WARRANTY OF ANY KIND (EXPRESS, IMPLIED OR STATUTORY) TO CUSTOMER OR ANY THIRD PARTY, INCLUDING, BUT NOT LIMITED TO, ANY EXPRESS OR IMPLIED WARRANTIES OF (1) MERCHANTABILITY; (2) FITNESS FOR A PARTICULAR PURPOSE; (3) EFFORT TO ACHIEVE PURPOSE; (4) QUALITY OR (5) ACCURACY. NO EMPLOYEE,

CONSULTANT, AGENT OR OTHER REPRESENTATIVE OF CONSULTANT HAS AUTHORITY TO BIND CONSULTANT TO ANY ORAL REPRESENTATIONS OR WARRANTIES CONCERNING THE SERVICES PROVIDED HEREUNDER.

6.2 Notwithstanding the foregoing, the services provided by Consultant hereunder shall be performed in a professional and workmanlike manner and shall substantially conform to the description of services set forth in the applicable statement of work.

6.3 Customer's sole remedy for Consultant's breach of its obligations under this agreement is as set forth herein. Should Consultant breach any warranty or representation in this Agreement, or should Consultant default under any term of this Agreement, Customer shall notify Consultant in writing and Consultant shall use reasonable diligence to remedy such breach within 30 days after receipt of such notice. Should Consultant fail to remedy such breach within such time, Customer shall be entitled to a reasonable abatement of fees hereunder. IN NO EVENT SHALL CONSULTANT BE LIABLE TO CUSTOMER FOR ANY AMOUNT IN EXCESS OF THE FEES ACTUALLY PAID BY CUSTOMER TO CONSULTANT FOR SERVICES AND PRODUCTS PROVIDED HEREUNDER. CUSTOMER FURTHER AGREES THAT IN NO EVENT SHALL CONSULTANT BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY LOSS OF PROFITS, LOSS OF DATA, LOSS OF USE, INTERRUPTION OF BUSINESS, OR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY KIND WHETHER UNDER THIS AGREEMENT OR OTHERWISE, EVEN IF CONSULTANT WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR WAS GROSSLY NEGLIGENT.

#### 7. Confidential Information.

7.1 Each party may be exposed, or have access, to confidential and proprietary information belonging to or supplied by the other party including, without limitation, Work Product, drawings, analysis, research, processes, computer programs, methods, ideas, know-how, business information (including sales and marketing research, materials, plans, accounting and financial information, personnel records, customer lists, and the like) and any other information either known by the receiving party to be confidential, or designated by the disclosing party as confidential either expressly or by the circumstances in which it is disclosed ("Confidential Information"). Confidential Information does not include information and/or data which: (a) has become publicly known through no violation of an obligation of non-disclosure of any person or entity; (b) was obtained by the recipient from a third party through no violation of an obligation of non-disclosure of any person or entity; (c) was independently developed without any use or reference to Confidential Information and through no violation of an obligation of non-disclosure of any person or entity; (d) has been approved for disclosure in writing by the disclosing party; (e) has been disclosed pursuant to a requirement of law, but only to the extent such disclosure is required; or (f) was in the possession of the recipient prior to the Effective Date, through no violation of an obligation of non-disclosure of any person or entity, as evidenced by written records.

7.2 Each party agrees, with respect to the other party's Confidential Information, and except as expressly authorized herein, that it shall not use, transfer, commercialize or disclose such Confidential Information to any person or entity, except to its own employees or subcontractors, to the extent that they have a need to know or have access to such Confidential Information in connection with the performance of this Agreement, and who are themselves bound by similar nondisclosure restrictions. Each party shall use at least the same degree of care in safeguarding the other party's Confidential Information as it uses in safeguarding its own confidential information, but in no event shall less than due diligence and care be exercised. The provisions of this Article 7 shall remain in effect for a period of five (5) years following termination of this Agreement or until one of the exceptions set forth in Section 7.1 applies, whichever occurs first.

8 Term, Termination and Suspension.

8.1 This Agreement shall remain in effect until the completion of the Consultant's services, plus a three year term in which Consultant provides hosting, content management and GIS software products. Upon termination of this Agreement under any of the foregoing provisions, and in addition to any other rights or obligations arising from such termination: (a) each party shall return to the other party all Confidential Information of the other party, in whatever form, in such party's possession or control, and shall delete all records containing such Confidential Information, except for a record of payments made hereunder; and (b) all obligations to perform under any current or subsequent Statement of Work shall cease. Should Atlas choose to or not be able to service the Customer, Atlas will deliver full source code to Customer, within 14 business days. Nothing contained herein shall be deemed to affect Consultant's right to suspend Consultants Services in the event of Customer's failure to timely pay obligations to Consultant under this Agreement

9. Dispute Resolution and Indemnification

9.1 In the event of any dispute arising under this Agreement, other than the payment of sums due to Consultant, the project manager for Consultant and the designated representative of Customer agree to meet within a reasonable time after such dispute arises to determine the nature of the dispute and corrective action to be taken to resolve such dispute. If such persons are unable to agree on such corrective action, they shall notify senior management of Consultant and Customer, who shall then meet to attempt to resolve such dispute. If management is unable to resolve such dispute, each party shall have such remedies and defenses as may be available at all and under this Agreement.

10. Indemnification

10.1 Consultant agrees to indemnify and hold the State of South Dakota, its officers, agents and employees, harmless from and against any and all actions, suits, damages, liability or other proceedings that may arise as the result of performing services hereunder. This section does not require Consultant to be responsible for or defend against claims or damages arising solely from errors or omissions of the State, its officers, agents or employees.

11. Procedures

11.1 Change Request Process

Customer may request changes within the general scope of work ("Change Requests"). Change Requests must be made in writing. Changes to work must be approved by the Customer and Consultant and may include the following:

1. Additions to or deletions from the specifications.
2. Changes in the time and place of performance.
3. Changes in the scope or nature of the work to be delivered.
4. Changes in the nature and quantity of deliverable work product.

If any change affects payments due or time of performance, details must be specified in the Change Request, which is approved by the Customer and Consultant.

Only authorized representatives of the Customer and Consultant shall make changes to the terms and conditions of this agreement. Neither Consultant nor Customer will be accountable for meeting commitments that have not been agreed to in an approved Change Request.

11.2 Additional Project Expenses

Typically such items as photography, image searching, hosting, printing, press checks, travel, etc., are necessary and can change the budget of the project. If a Change Request shall result in additional project expenses, Consultant will use reasonable efforts to outline any changing budget costs as a result of such Change Request and submit such outline to Customer for approval.

**11.3 Deadlines.** Customer and Consultant will adhere to all deadlines agreed to at the outset of the project to ensure budget costs remain in accordance with the signed proposal. If the Customer or Consultant do not adhere to all deadlines, either Consultant may be required to amend budget costs or amend projected timelines as follows:

1. Our project estimate assumes the website will be completed by April 22, 2011 "
2. Our estimate includes the required hours from our service groups (project management, technology and creative) to deliver the site by April 22, 2011

**11.4 Signoff**

At major project milestones, signoff is required on all project materials by the client in written form. Signoff constitutes acceptance of materials for use. Verbal confirmation does not constitute acceptance.

**12. Non Hiring Covenant.**

12.1 Customer hereby covenants and agrees that during the term of this Agreement and for a period of twenty four (24) months thereafter, Customer and its affiliated companies, including, without limitation, their respective officers, directors or employees, shall not solicit for employment any current or former employee of Consultant or its affiliated companies or current or former independent contractor or member of the contract sales force of Consultant or its affiliated companies ("Restricted Person"). The term "employ" as used in this section shall mean any relationship in which compensation is paid directly or indirectly by Customer for or to a Restricted Person, including, without limitation, direct employment, leased employee, an independent contractor relationship or through an employment agency. The term "former" as used in this section shall mean during the term of this Agreement or the prior 12-month period.

**13. General Provisions**

13.1 The construction, validity and performance of this Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota, and the parties expressly waive choice of law rules. The parties agree that venue and jurisdiction for any litigation arising out of, related to, or regarding the validity of this agreement shall lie in the Circuit Court in and for Hughes County, South Dakota.

13.2 The relationship of Consultant and Customer established by this Agreement is solely that of independent contractors. Nothing contained herein shall be deemed to establish a partnership, joint venture, association or employment relationship between the parties.

13.3 In the event that Consultant shall be required to commence any action to enforce the terms of this Agreement, Consultant shall in any such action be entitled to an award of its costs and reasonable attorneys fees.

13.4 Neither party shall be liable in damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its reasonable control including, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected, however the inability or failure to pay obligations under this Agreement shall not be excused by the terms of this section.

13.5 This Agreement and its attachments constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all other agreements, either oral or in writing, between the parties with respect to the matter stated herein.

13.6 This Agreement may be modified or amended only by a writing signed by the party against whom enforcement is sought.

13.7 If any provision of this Agreement is held invalid or unenforceable for any reason, such determination will not affect the remaining portions of this Agreement, and the affected provisions shall be interpreted and enforced to the full extent possible to carry out the intent of such provision.

13.8 Failure to enforce this Agreement shall not be a waiver of any provision of this Agreement, and a waiver of breach shall not be a waiver of any other or subsequent breach.

13.9 "Consultant agrees to obtain and provide proof of the following insurance coverage:

A. Commercial General Liability Insurance:

Consultant shall maintain occurrence based commercial general liability insurance or equivalent form with a limit of not less than \$1,000,000.00 for each occurrence. If such insurance contains a general aggregate limit it shall apply separately to this Agreement or be no less than two times the occurrence limit.

B. Professional Liability Insurance or Miscellaneous Professional Liability Insurance: Consultant agrees to procure and maintain professional liability insurance or miscellaneous professional liability Insurance with a limit not less than \$1,000,000.00.

C. Business Automobile Liability Insurance:

Consultant shall maintain business automobile liability insurance or equivalent form with a limit of not less than \$1,000,000.00 for each accident. Such insurance shall include coverage for owned, hired and non-owned vehicles.

D. Worker's Compensation Insurance:

Consultant shall procure and maintain workers' compensation and employers' liability insurance as required by South Dakota law."

13.10 This Agreement depends upon the continued availability of appropriated funds and expenditure authority from the Legislature for this purpose. This Contract will be terminated by the Customer if the South Dakota Legislature fails to appropriate funds or grant expenditure authority. Termination for this reason is not a default by the Customer nor does it give rise to a claim against the Customer."

13.11 Consultant agrees to report to the State any event encountered in the course of performance of this Agreement which results in injury to any person or property, or which may otherwise subject Consultant, or the State of South Dakota or its officers, agents or employees to liability. Consultant shall report any such event to the State immediately upon discovery.

Consultant's obligation under this section shall only be to report the occurrence of any event to the State and to make any other report provided for by their duties or applicable law. Consultant's obligation to report shall not require disclosure of any information subject to privilege or confidentiality under law (e.g., attorney-client communications). Reporting to the State under this section shall not excuse or satisfy any obligation of Consultant to report any event to law enforcement or other entities under the requirements of any applicable law."

13.12 Consultant shall not use Customer's equipment, supplies or facilities, except that Consultant shall have access to a work space and computer as provided herein."

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto have caused this

Agreement to be executed by their duly authorized representatives.

Consultant

By:

Title:

Date:

Customer

By:

Title:

Date:

BIT Commissioner

By:

Title:

Date:

ATTACHMENT A.

STATEMENT OF WORK

(Check one) ☒ Original ; ☐ Supplemental Number .

Note: Both parties' signatures must appear for Supplemental Statements of Work.

Consultant

By: Ben Huling

Date: 2/18/11

Customer

By: John C. Secretary DTSD

Date: 2/22/11

BIT Commissioner

By: John E. Elman

Date: 2/24/11

**Included Agency Services**

- Website design and development
  - Includes three templates: 1 home page, 2 support pages and one consolidated round of revisions on design
  - Atlas CMS/ HTML programming complete with all standard Content Management System features and the Atlas Data Cart.
  - Trainings:
    - CMS 101 (1 ½ hrs)
    - CMS 201 (1 hrs)
- Installation of Atlas InSite
  - Property/Sites and Buildings Database, with property data and photos provided by the customer
  - Business Data Base
    - Data licensed from Dun & Bradstreet
- Search Engine Optimization
  - Assign keywords for the top 10 pages of the website
  - Create and implement into Atlas CMS custom Meta Data for the top 10 pages of the website
  - Optimize content for keyword density up to the first 250 words and implement into Atlas CMS
- Website Analytics Setup



- Google Analytics: Setup of analytics within website and monthly reports generated to Customer

## Website Development Process:

***The following is the process we propose to use to design and develop your website:***

## Work Plan

Project Kick-off Date: February 23, 2010

Estimated project duration for website: 10 weeks

Proposed Website Launch: April 22, 2011

### Discovery/Definition Services (1 - 2 weeks)

In this phase, we will discuss the plan of action and to conduct interviews with key stakeholders. This phase will set the tone for the entire project. We will discuss how best to address and communicate your brand, and devise the best solution for your organization. We will also define the site's navigation so that it is clear and delivers all relevant content in three clicks or less. Interviews with your team to uncover any and all needs and requirements for the website are crucial. It would be ideal to interview other stakeholders as well. We can do all of this virtually, though a trip to your community is preferred.

- Website kickoff to set goals define scope
- Review comparison websites to develop opportunities and recommendations
- Develop Site Information Architecture Development (Site map)
- Client audit of all content: Photography, copy, and any other items
- Technical requirements definition, hosting specifications determined
- Client signoff on project notebook

### Website Design Services (3 - 4 weeks)

Atlas will design the Governor's Office of Economic Development's website with a new graphic look and feel. We will use graphic design that highlights both the region (the product) and the organization (the service), and incorporate messaging from the area's brand to make our concepts come alive. You will receive two design options; both based on the approved architecture, and have the opportunity for review and comment.

- Visual Design - Develop two visual design options based on the existing brand and new website architecture, including up to two rounds of changes.
- Development of support page templates (expect 2 different page templates)
  - Template designs will take into account the adjustments that will have to be made to pages with translated content.
- Development of training manual and training courses customized to your site and the tools presented through your site.

### Website Development Services (3 - 4 weeks)

In this phase, we will develop the website in the Atlas Content Management System. Atlas CMS is a fully web-based system that governs management of all pages, and includes website search, a system to categorize and manage documents called media manager, a drag and drop document publishing system, a dynamic news and press release management system, and many other features.

At the end of this phase, you will receive your completed website, with all associated tools and features, but without the site content. You will be trained to upload, edit, and format content so that it is appropriate and comprehensive for an economic development audience. Content development may take another two weeks depending where you are in the process.

## ATTACHMENT B.

### COMPENSATION

#### Pricing Summary

Website Discovery, Design and Development	<b>\$25,500</b>
InSite Development <ul style="list-style-type: none"><li>• Property Database</li><li>• Business Database</li></ul>	<b>\$9,000</b>
Search Engine Optimization	<b>\$2,500</b>
Google analytics setup	<b>\$500</b>
Annual Maintenance, Support and Software, and hosting *	<b>\$1,432</b>
Third Party Data Costs (Annual) <ul style="list-style-type: none"><li>• Business Data</li></ul>	<b>\$2,500</b>
<b>Total Costs, February - June 2011</b>	<b>\$41,432</b>

*Annual Maintenance, Support and Software fee's for the months of May and June. Based on an annualized fee of \$8,592.*

#### Payment Policy

Please note that this project is billed on a fixed price, fixed scope basis. Any changes from the agreed to scope will result in a change order.

- a 33% project payment will be collected with the contract at in the beginning before work begins.
- the remainder of the project will be billed with progress billing once 33% of the project

has been completed.

The Client will receive invoices as stated above and progress statements monthly.

Please make checks payable to Atlas Advertising llc.  
Mail to: 2601 Blake St Ste 301  
Denver, CO 80205

All invoices are payable within 30 days ( our grace period ) or will be subject to a late fee charge of 1.5% for each 30 days late (18% APR).

Note: Both parties' signatures must appear Attachment B. Compensation.

Consultant

By:

Ben Aulright  
Date: 2/18/11

Customer

By:

Patricia Secretary QTSB  
Date: 2/23/11

BIT Commissioner

By:

Jim Edman  
Date: 2/24/11

State Agency Coding (MSA Center): 0410020

State Agency MSA Company for which contract will be paid: 1000

Object/subobject MSA account to which voucher will be coded: 52040500

Name and phone number of contact person in State Agency who can provide additional information regarding this contract: Mary Lehecka Nelson 773-3301